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No. 87-1429

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

SOUTHWESTERN BELL TELEPHONE COMPANY ..... *Petitioner*

vs.

ARKANSAS PUBLIC SERVICE COMMISSION, ET AL ..... *Respondents*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Act requires a state regulatory agency to use collectively-bargained wage levels to calculate utility rates.

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STATEMENT OF THE CASE

We must restate the case because Southwestern Bell's Statement is misleading and argumentative in the extreme. The reader could be led to believe that the Arkansas Public Service Commission (Commission) somehow prevented recovery of wage costs, penalized the Company, and caused annual losses. None of these implications comport with the facts.

Southwestern Bell requested approval of an intrastate rate increase in the amount of $60,946,000. The Commission held hearings on the proposed rate increase. Testimony offered in those hearings led the Commission to determine that Southwestern Bell's claim for non-management wage expenses in a pro forma year should be adjusted downward. At the

conclusion of that proceeding, the Commission granted Southwestern Bell an overall rate increase of $22,957,000. Once this increased cost of telephone service was approved by the Commission, Southwestern Bell could prospectively charge its customers at higher rates. Every expenditure for which Southwestern Bell sought recovery from its rates was subject to scrutiny by the Commission.

SUMMARY OF THE ARGUMENT

Southwestern Bell proposed an intrastate telephone rate increase, and the Arkansas Public Service Commission reviewed the utility's expenses for reasonableness. The wage expense allowance was among the various categories of expenses which the Commission examined. The Commission determined Southwestern Bell's wage levels to be unreasonably high for ratemaking purposes. This process of review and determination of reasonableness is necessary to calculate an annual revenue requirement and set telephone rates accordingly. The Commission's review and its requisite regulatory power to adjust claimed expenses before setting lawful rates is the very essence of its regulatory function.

The Commission's orders do not require Southwestern Bell to alter any past or future agreement with the Communication Workers of America (CWA); therefore, there is no conflict with Southwestern Bell's contractual obligations or CWA's entitlements under contract. There is no conflict with the obligation to bargain in good faith under the National Labor Relations Act (NLRA). Southwestern Bell has failed to demonstrate how it would be prevented from entering into a good faith agreement with CWA, or having once entered into such an agreement, how it would be unable to perform its contractual obligations. The NLRA does not even arguably relate to employers' revenues, whether the employer is a regulated utility or not. How or whether an employer recovers the money necessary to pay contracted-for wages is completely foreign to the concerns of the NLRA.

ARGUMENT

I.

THE EIGHTH CIRCUIT CORRECTLY DECIDED THE ISSUE OF FEDERAL PREEMPTION UNDER THE NLRA.

In a very thorough opinion, the Eighth Circuit considered and rejected all of Petitioner's arguments. (Pet. B-4—B-11) Yet Southwestern Bell continues to assert that its state regulator has interfered with the bargaining process and required the Company to go to the bargaining table with the wage term already fixed. (Pet. 8) This has never been the case. Southwestern Bell stipulated that it is not bound by the Commission's determination of a reasonable expenditure to the extent that the Commission has not prohibited the payment of any costs, such as contractual wage costs. (Pet. C-9) Approximately 11 months prior to seeking a rate increase, Southwestern Bell agreed to certain wage levels with the CWA. (Pet. C-6) The Commission was not party to that agreement and did not participate in the negotiations leading up to it.

The Commission is vested by Arkansas law with the authority to determine the just, reasonable, and sufficient rates to be charged by public utilities providing intrastate service in the state of Arkansas. A.C.A. §§23-4-103, 201. (Pet. 3) The authority vested in the Commission is consistent with the federal scheme for regulation of telephone utilities to the extent that the Federal Communications Act of 1934, 47 U.S.C. §151 et seq., establishes, among other things, a system of dual state and federal regulation over telephone service. *Louisiana Public Service Comm. v. FCC*, 476 U.S. 355, 360, 90 L.Ed.2d 369, 376, 106 S.Ct. 1890, 1894 (1986).

Under this system of regulation, an overall figure of prospective reasonable costs and expenses, referred to as the revenue requirement, is derived in each rate case.

In determining the revenue requirement, the Commission reviews the numerous expenditures incurred by the utility in providing service. Once the Commission determines what a reasonable revenue requirement is, the utility's rates are designed to allow the utility to recover that revenue requirement, based on projected usage. This is how public regulatory agencies ensure that utilities do not charge monopolistic rates, yet receive sufficient revenues to pay reasonable expenses and provide an adequate return on the utility's capital investment. *South Cent. Bell Tel. v. Louisiana Public Serv. Com'n*, 744 F.2d 1107, 1109 (5th Cir. 1984), remanded on other grounds, 476 U.S. 1166, 90 L.Ed.2d 972, 106 S.Ct. 2884 (1986).

The expenses incurred by a utility in providing service include the wages of the utility's employees. In the case at bar, the Commission set an operating expense level which included a reasonable allowance for wage expenses. In determining a reasonable wage expense allowance, the Commission relied upon testimony provided by a consulting firm employed by the Commission staff. The consultants reviewed a list of job titles and descriptions provided by Southwestern Bell. The consultants surveyed 24 of those positions with comparable matches in other companies for which compensation data was available and determined the average wage or salary for each position. In consideration of that expert testimony, the Commission found some of its staff's recommended wage and salary adjustments to be valid and found that ratepayers should only be charged with that portion of wages and salaries that is within a reasonable range of the competitive market. The Commission then calculated a reasonable wage and salary expense for Southwestern Bell to be 110% of the average competitive salary for the various job descriptions under review. (Pet. D-46)

The Commission recognized that 28.06% of Southwestern Bell's claimed expenses are allocated to the interstate juris-

diction pursuant to the Federal Communications Commission's regulations governing the allocations of such costs. (Pet. D-38) Thus, the percentage of wage and salary expense allowance which the Commission found to be in excess of a reasonable allowance was applied to reduce only the intrastate portion of Southwestern Bell's claimed expenses. This is how the Commission determined a reasonable wage expense allowance in the ratemaking process. In determining a reasonable wage expense for ratemaking purposes, a regulatory agency in its discretion may use average costs or allowances rather than the actual cost figures supplied by the utility. *Central Ark. Auction Sale, Inc. v. Bergland*, 570 F.2d 724 (8th Cir. 1978), cert. denied, 436 U.S. 957, 57 L.Ed.2d 1121, 98 S.Ct. 3070 (1978). This allowance for a reasonable wage expense was added to other factors to arrive at an intrastate revenue requirement. (Pet. D-62) Charges for intrastate telephone service were then designed to cover that revenue requirement annually.

This regulatory process is known as prospective rate base regulation. Once the process is completed and rates are set, Southwestern Bell is, of course, free to operate at a profit or loss, based on its operating efficiency. The Commission has no knowledge or control of how many employees Southwestern Bell retains, or how much the company pays them. Although this rendition of the regulatory process may sound elementary, it seems necessary to recite as rebuttal to Southwestern Bell's argument.

II.

THE COMMISSION'S ORDERS ARE NOT PRE-EMPTED BECAUSE UTILITY RATE REGULATION IS AN ECONOMIC FORCE WHICH MUST BE GIVEN FREE PLAY UNDER THE NLRA:

Southwestern Bell argues that by making adjustments to

its wage expenses, the Commission places the Company in a position where it must reduce its wage expenses to conform with the Commission's ratemaking adjustments. It is interesting to imagine what the CWA representative would probably say to Southwestern Bell's management if they dared to make such an assertion at the collective bargaining table. The union might pull out the Commission's Order No. 21 and inform Southwestern Bell's management that the Commission made upward adjustments totaling $15,436,000 in the same order. (Pet. D-29—D-34) Southwestern Bell's claim that its hands are tied should be no more convincing to the Court than it would be to the union.

If the Eighth Circuit were reversed, the Commission would have to pass through any and all wage levels agreed upon by the monopoly and a union. What Southwestern Bell refers to as the free play of economic forces (Pet. 8) amounts to a free ride. Here is a monopoly enterprise seeking to pass through wage costs free of any restraint by the market or regulation. If the utility and its union could pre-emptively pass through wage costs, the customer would have no power to resist, because the company enjoys a legal monopoly in local telephone service. Neither would the Commission have any power if it were denied its traditional power to assess the reasonableness of utility expenses to be recovered through rates. The monopoly's shareholders would have no incentive to keep down wage costs in such a situation.

In exercising its authority to set intrastate telephone rates, the Commission acts as a surrogate for the competitive market.

> The regulated industries have always operated within the framework of a competitive economy. They must obtain capital, labor, and materials in competition with non-regulated industries. Adequate profits are not guaranteed to them. Regulation, then, should provide incentives to adopt new methods, improve quality, increase efficiency,

> cut costs, develop new markets, and expand output in line with consumer demand. In short, regulation is a substitute for competition and should attempt to put the regulated industries under the same restraints competition places on non-regulated industries.

Charles F. Phillips, Jr., *The Economics of Regulation*, (Richard D. Irwin, Inc., 1969) p. 125. If local telephone companies were in competition with each other, the price of their service would be determined by a competitive market. Of course, a company in a competitive market may not sue its customer for not providing it with enough sales income to meet the contractual demands of its union. Likewise, the Commission's determination of a reasonable price for Southwestern Bell's services, in lieu of a competitive market, need not guarantee recovery of extraordinary labor costs. There is no NLRA requirement of a market price which guarantees recovery of labor costs.

> Regulation, it is said, is a substitute for competition. Hence its objective should be to compel a regulated enterprise, despite its possession of complete or partial monopoly, to charge rates approximating those which it would charge if free from regulation but subject to the market forces of competition. In short, regulation should be not only a substitute for competition, but a closely imitative substitute.

James C. Bonbright, *Principles of Public Utility Rates*, (New York and London, Columbia University Press, 1961) p. 93. In competitive markets, the purchaser of a service does not necessarily inform the provider of the service that its price is too high because of the wage component. However, when a state regulatory agency sets about its determination of reasonableness, it must document its judgment so that it may be reviewed by the courts. The Commission did not simply inform Southwestern Bell that its proposed rates would be too

high, then order an arbitrary lower rate into effect. The Commission found that wages paid certain categories of employees, some categories of which are subject to collective bargaining and some of which are not, exceed the reasonable expense level necessary to provide adequate telephone service. (Pet. D-45) This sort of specificity permits review of the reasonableness of this Commission's determination. If, in the alternative, the Commission were to undertake a more generalized approach and merely state that total wage and salary expenses were too high, Southwestern Bell would rightfully be heard to argue that the order was not supported by substantial evidence. For the Commission to responsibly determine that a wage level is too high, it must run the risk of giving utility management ammunition to use at the bargaining table.

III.

THE EIGHTH CIRCUIT'S DECISION IN THIS CASE IS CONSISTENT WITH ESTABLISHED PRECEDENT.

The Eighth Circuit relied on *Mass. Nurses Ass'n v. Dukakis*, 726 F.2d 41 (1st Cir. 1984), a case directly on point. (Pet. B-9) It concerns an action by the Nurses Association seeking declaratory and injunctive relief from a Massachusetts hospital payment law. Just as the Arkansas Commission sets rates prospectively, the Massachusetts law established a prospective method of reimbursing hospital costs:

> Under this system an overall figure of prospective reasonable costs is derived at the beginning of the year by projecting estimates of component costs. The resulting figure, which is called the maximum allowable cost, is the amount that a hospital is allowed to collect for care provided in a given year to all its patients, whatever may be the source of payment.

Massachusetts Nurses at 42. This case involves a state statute which empowers a rate-setting commission to make an annual determination of the amount which will be paid to each hospital in the state. The legislation attempts to establish a common level of charges for all hospital services. *Massachusetts Nurses* at 45. The issue presented in *Massachusetts Nurses* is whether the statute impermissibly interferes with the collective bargaining efforts of the Massachusetts Nurses Association. *Massachusetts Nurses* at 42. The Association contended that the Massachusetts law is pre-empted to the extent it conflicts with federal law and stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Massachusetts Nurses* at 42. In deciding the issues presented, the First Circuit states that the case does not involve state interference with the rights of labor or management. The First Circuit held that the Massachusetts law affects the labor-management relationship only indirectly through its regulation of the employer's annual gross income. *Massachusetts Nurses* at 43.

As evidenced by the Commission's orders here at issue, the Arkansas Commission, like the Massachusetts Commission, merely regulates the employer's annual gross income and establishes a common level of charges for service. Actually, Southwestern Bell might recover more than what the Commission anticipated if the number of customers were to increase beyond estimates. After distinguishing the cases cited by the Massachusetts Nurses Association, and after discussing the relevant federal legislation, the First Circuit states:

> Finally, aside from precedent, deference, and the intent to be derived from federal legislative evolution, we sample the implication of appellant's reasoning. First of all, in any industry the price of whose product or service — such as electric power, telephone, natural gas, or even rent controlled real estate — is regulated, a state would find its regulatory system vulnerable to pre-emptive attack on the

> ground that the overall control of price was too inhibiting an influence on collective bargaining. Logic, however, would carry beyond simple price control. Any state or municipal program that substantially increased the costs of operation of a business in a competitive market would be similarly vulnerable to the pre-emption argument. Clean air and water laws, selective cutting requirements in forest operations, industrial safety standards, tax increases — all pro tanto hobble collective bargaining in that they constitute part of the universe in which collective bargaining takes place, just as do general prosperity or depression. But they do not add to or detract from the rights, practices, and procedures that together constitute our collective bargaining system.

Massachusetts Nurses at 45.

Another case in point is *Wash. State Nurses Ass'n v. Wash. State Hospital Com'n*, 773 F.2d 1044 (9th Cir. 1985), cert. denied, 475 U.S. 1120, 106 S.Ct. 1637 (1986), concerning an action by the Nurses Association against the State Hospital Commission in Washington alleging that the Hospital Commission interfered with the nurses' state and federally protected rights to bargain for wage increases. The State of Washington grants the Washington State Hospital Commission the power to determine the maximum rates which each hospital in the state can charge patients. The Hospital Commission uses guidelines to determine the reasonableness of wage increases as a component of the hospital's overall expense levels. A finding of the Washington District Court, adopted by the Ninth Circuit, notes that:

> By statements at public hearings, the Commission used its position to influence hospitals to negotiate wage settlements with little or no wage increase. Commission members repeatedly told hospital officials that wage increases exceeding 5% would have to be "justified."

> Commission members on at least two occasions, without dissent or disclaimers, have cautioned hospitals against setting higher than desired wage increases with the Association and have urged hospital negotiators to emphasize the Commission's salary and wage policies in upcoming negotiations with the Association.

Washington State Nurses at 1046. In reversing the District Court's finding of NLRA pre-emption, however, the Ninth Circuit held that:

> The budget review practices and public pronouncements, while undoubtedly intended to encourage hospitals and unions to minimize cost increases, could not control the terms of any particular collective bargaining agreement, and did not interfere in any impermissible way with the exercise of collective bargaining rights protected by Section 7 of the National Labor Relations Act, 29 U.S.C. §157.

Washington State Nurses at 1045. In so finding, the Ninth Circuit notes that the hospitals are free to pay wages at any level and are not bound by the Hospital Commission's decision of what constitutes an appropriate wage level. In the case at bar, Southwestern Bell stipulated that it is not bound by the Commission determination of a reasonable expenditure to the extent that the Commission has not prohibited the payment of any costs, such as contractual wage costs. (Pet. C-9) The Eighth Circuit cited this case in support of its decision. (Pet. B-10) There is no conflict between the Eighth Circuit's decision and decisions rendered in similar cases in other circuits. Further, there is no conflict among cases on similar facts among the circuits.

IV.

NLRA "GOOD FAITH" AND ECONOMIC WEAPONRY ARE UNAFFECTED BY THE COMMISSION'S RATE REGULATION.

Southwestern Bell has argued that NLRA "good faith" is threatened by the Commission's orders. The proposition that negotiated wage levels are reasonable per se for ratemaking purposes cannot be derived from the NLRA obligation to bargain in good faith:

> [T]here is nothing in the Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes.

American Shipbuilding v. N.L.R.B., 380 U.S. 300, 313, 85 S.Ct. 955, 965, 13 L.Ed.2d 855, 865 (1965). If Southwestern Bell were to enter contract negotiations offering wage levels in line with revenues it could collect for telephone service, and even if the offer would decrease wages from previouis levels, that offer would not be "bad faith" bargaining. The Company is free to endeavor to secure a contract compatible with its financial condition under the NLRA requirement of good-faith bargaining. *N.L.R.B. v. Wonder State Manufacturing Company*, 344 F.2d 210, 217 (8th Cir. 1965). The Act does not compel either party to agree to a proposal or require either party to make a concession. An employer may continue to assert that a decrease in the wage scale is essential to its survival and still be bargaining in good faith. *Neon Sign Corp. v. N.L.R.B.*, 602 F.2d 1203, 1205 (5th Cir. 1979). In the cited case, the employer was experiencing serious business and financial problems and the union was so informed. The bargaining began with the employer proposing a reduction in the wage scale and the union demaning higher pay. Throughout the bargaining, the employer did not depart from its insistence upon a reduction in

wages, while the union made a number of proposals, all of which called for higher wages and increased fringe benefits. The court found that the employer's adamant insistence upon a bargaining position was not of itself a refusal to bargain in good faith, citing *Chevron Oil Co., Standard Oil Co. of Texas Division v. National Labor Relations Board*, 442 F.2d 1067 (5th Cir. 1971) and *National Labor Relations Board v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960). *Neon Sign Corp.* at 1205. Firmness of a bargaining position does not constitute bad faith. *Dallas General Drivers, etc. Local 745 v. N.L.R.B.*, 355 F.2d 842, 844 (D.C. Cir. 1966).

A company's firm refusal to grant any increase to some of its workers because it was already paying more to this group of employees than were any of its competitors was found consistent with the obligation to bargain in good faith. *Sign and Pictorial U. Local 1175, B. of P., D. & P. v. N.L.R.B.*, 419 F.2d 726, 733 (D.C. Cir. 1969). That bargaining position is certainly comparable to one Southwestern Bell could assume. It might choose to firmly refuse to grant any wage increase because it was already paying higher wages than any of its competitors. Southwestern Bell could assume this bargaining position with or without the Commission's orders. In either case, Southwestern Bell could be bargaining in good faith under the NLRA and the decisions of the circuit courts of appeals cited above — *Neon*, *Dallas* and *Sign and Pictorial* — while holding the line on wages for economic reasons. Southwestern Bell could even demand wage concessions in good faith. No matter how unacceptable a roll-back in wages might be to a union, a company with an economic reason for proposing a roll-back may insist on it without running afoul of the NLRA. A company with a genuine limit on earnings may maintain its proposal for a roll-back, even to an impasse. *Pease Co. v. N.L.R.B.*, 666 F.2d 1044, 1049 (6th Cir. 1981), cert. denied, 456 U.S. 974, 102 S.Ct. 2238 (1982).

However, this hypothetical roll-back position on wages

would not necessarily follow from the Commission's setting of the revenue requirement. As previously discussed, Southwestern Bell has all the normal prerogatives of management — e.g., wage reductions, attrition, lay-offs, and technological change — by which to adjust its wage expenses or overall net income. As a regulated monopoly, Southwestern Bell has additional management tools — the foreknowledge of reasonably predictable yearly revenues within the security of captive markets — to ease the task of budgetary adjustments.

The NLRA provision that employer and union representatives bargain in good faith requires wage proposals from both sides backed by honest reasons. If a wage pass-through were to be pre-emptively ordered, Southwestern Bell's management could not, in good faith, oppose any union demand for wage increases because the increased wages could be passed through to a captive market. If Southwestern Bell's management could not honestly oppose a CWA wage increase proposal for economic or regulatory reasons, the NLRA fails to regulate labor-management relations and the Commission fails to regulate utility rates. Employer and employee are free to maintain bargaining positions which the other considers unacceptable, but neither may pursue a course designed to avoid a contract of any nature. *N.L.R.B. v. United Clay Mines,* 219 F.2d 120, 125 (6th Cir. 1955). The only conceivable way the Commission could effect bad faith bargaining of this variety by Southwestern Bell would be by ordering the Company not to reach ultimate agreement with its employees. As reflected by the stipulation, the Commission has not made any order relating to labor negotiation or Southwestern Bell's capacity to pay contracted-for wages.

Southwestern Bell does not define what it means by "good-faith" nor does Southwestern Bell explain how the Commission might obstruct the good-faith obligation. The foregoing discussion is an attempt to define what good faith is generally considered to mean in labor law precedent.

Innumerable wage demands and company plans for giving raises have been chilled by price competition in the unregulated market — and the NLRA can do nothing about it. The NLRA does not guarantee that wage demands will be warmly received by management or consumers, only that they will be discussed by employers and employees. 19 U.S.C. §158(d) (Pet. 3-4) The same must remain true of the regulated market. After all, captive customers of a monopoly have no real substitute for their telephone and no real economic choice but to pay their phone bill. Why should management and union be free from any economic constraint on the wage component of the price for their service when the public is so vulnerable? There are no domestic or foreign competitors, only the Commission, to provide economic pressure in this market. If any component of telephone rates escapes regulatory scrutiny, that price component can gouge the customer to any depth.

The Commission in this case made no order relating to CWA or Southwestern Bell's economic weapons under the NLRA. The Commission does not know, or design to control, how either side behaves in labor negotiations — the Commission only cares to deal with the quality of service rendered and the rates charged to the public. The Commission did not set or determine wage levels to be paid. It did ascertain hypothetical reasonable levels for wages, then multiplied those hypothetical wage levels by the average number of employees during the twelve months in the test year, and finally limited the company's estimated rate income accordingly. If this affects the Company's bargaining position or the Union's, so be it. The substance of bargaining demands is not even arguably regulated by the NLRA — only the process is regulated. This distinction between substance and process must be recognized, or the NLRA is misunderstood as some sort of economic entitlement legislation.

The effect of the Commission's findings as to reasonable wage levels is repeatedly characterized by Southwestern Bell as

being intrusive in the bargaining process, but no degree of intrusion is sufficient to transform possible effects on a bargaining position into interference with the protected bargaining process. If industrial peace and wage increases have resulted from the NLRA over the years, it is not because the NLRA prevents strikes or guarantees raises. It is because structured negotiation under the law has eliminated many abuses and reprisals, while requiring labor and management to negotiate certain vital issues of more importance to unions than to management. The progress brought about under the NLRA must not be confused with a substantive provision of the act. The letter and intent of the law is to enforce order in labor negotiations, not to guarantee uninhibited wage increases. It is the Commission's right to regulate which is at stake in this case, not the Company's or the Union's right to bargain. A real-world analysis of what this case represents leads to the conclusion that court-sanctioned pass-through of wage costs to consumers is the threatened change to the status quo, not the Commission's review and adjustment of a utility's expenses for reasonableness.

The Eighth Circuit correctly pointed out that *Golden State Transit* was not controlling in this case. In *Golden State Transit*, this Court held that the NLRA pre-empts the attempted restriction of a transportation employer's ability to resist a strike, applying the *Machinists* pre-emption doctrine that the employer as well as employee has the right to use economic weapons without state prohibition. *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 618, 89 L.Ed.2d 616, 626, 106 S.Ct. 1395, 1401 (1986); *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 147, 49 L.Ed.2d 396, 96 S.Ct. 2548 (1976). The *Machinists* case involved state proscription of secondary boycott activity that Congress has not proscribed. The rights to strike and to resist a strike are economic weapons protected by the NLRA, and the regulatory body interfered with one of those rights in *Golden State Transit*. But there is no right to wage increases under the NLRA. There is no right

under the NLRA to be free of economic influences on a party's bargaining position. *American Shipbuilding v. N.L.R.B.*, 380 U.S. 300, 313, 85 S.Ct. 955, 965, 13 L.Ed.2d 855, 865 (1965). Protecting a free use of economic weapons during the course of negotiations was the rationale for the Supreme Court's findings of pre-emption in *Machinists* and *Golden State Transit*. *Golden State Transit*, at 625.

The facts in this case are not similar to those in *Golden State Transit* or *Machinists*. The Commission's orders were not issued during a labor dispute and did not require Southwestern Bell or CWA to take any position in any future labor dispute. Employer and employee remained free to use all their economic weapons against each other. This freedom distinguishes the case at bar from *Golden State Transit* because in that case the employer was required by the regulator to settle a strike as a condition of obtaining its franchise. The Commission has not required Southwestern Bell to do anything or place any condition on its labor negotiations. In *Machinists*, the state prohibited exercise of the secondary boycott right protected by the NLRA. The Commission, in this case, has not prohibited the exercise of any right protected by the NLRA. CWA is free to demand wages in excess of the Commission's determination of reasonableness; Southwestern Bell is free to pay negotiated wages at any level.

It might be easier for the Union and the Company to agree on wage issues if all increased labor costs could be passed on to Arkansas ratepayers, but nothing in the NLRA guarantees that negotiated wage levels can be recovered from consumers. The purpose of the NLRA is to get employers and employees together, and yet not eliminate the risk of error they each must bear in making their economic predictions and setting their bargaining goals.

CONCLUSION

The United States Court of Appeals for the Eighth Circuit correctly held that the Arkansas Commission's disallowance of what it deemed to be unreasonably high wage expenses, while perhaps indirectly affecting future bargaining strategy, does not control the terms of any particular collective bargaining agreement and does not interfere in any impermissible way with the exercise of collective bargaining rights protected by the NLRA. Respondents therefore pray for the reasons stated in this Brief that Petitioner be denied a Writ of Certiorari.

Respectfully submitted,

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